Supreme Court, U.S.
FILED
JUN 9 1993
OFFICE OF THE CLERK

No. 92-216

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,
Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

SECOND SUPPLEMENTAL BRIEF

WILLIAM T. PAYNE
SCHWARTZ, STEINSAPIR DOHRMANN & SOMMERS
3580 Wilshire Boulevard
Suite 1820
Los Angeles, CA 90010

MIRIAM R. KATZMAN
ZUBRENSKY, PADDEN, KATZMAN & WEIR
828 N. Broadway
Suite 410
Milwaukee, Wisconsin 53202

CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

ROBERT M. WEINBERG
(Counsel of Record)
JULIA PENNY CLARK
VIRGINIA A. SEITZ
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

CASES

	Page
Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512 (8th Cir. 1988)	4
Bidlack v. Wheelabrator, No. 91-2378 (May 18, 1993)	*passim*
International Union, United Auto, etc. v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)	3, 4
Keffer v. H.K. Porter Co., 872 F.2d 60 (4th Cir. 1989)	4
Local Union No. 150-A, United Food & Commercial Workers, etc. v. Dubuque Packing Co., 756 F.2d 66 (8th Cir. 1985)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-216

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,

Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

SECOND SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, petitioners file this supplemental brief to discuss the Seventh Circuit's *en banc* decision in *Bidlack v. Wheelabrator*, No. 91-2378 (May 18, 1993) ("*Bidlack*"). As we show, *Bidlack* confirms that the circuits are in conflict as to the legal rules for ascertaining the intended duration of collectively-bargained entitlements to retiree insurance benefits. The question posed by that conflict is squarely presented by the instant case and by our petition and is in need of resolution by this Court.

1. In a prior supplemental brief filed on August 25, 1992, petitioners informed the Court that in *Bidlack*, the Seventh Circuit had issued an order setting for hearing before the court *en banc* the question whether its earlier

decision in this case should be overruled. In light of that order, petitioners requested, *inter alia*, that this Court hold the petition in *Senn* in abeyance until the Seventh Circuit decided *Bidlack*. The *Senn certiorari* petition continues to be pending. The Seventh Circuit has now issued its *Bidlack* decision.

2. In *Bidlack* the retired employees of Wheelabrator Corporation sought to enforce collectively-bargained rights to health insurance benefits for life. The district court granted summary judgment for the company holding that the operative contract language "reveals no intention on Wheelabrator's part to provide pre-1986 retirees the same level of benefits at no cost for life" and that such an intention may not be proven with extrinsic evidence. Slip Op. at 2 (quoting district court opinion).[1] The *en banc* Seventh Circuit reversed and remanded holding that the contract language at issue in *Bidlack* is ambiguous and that extrinsic evidence should be admitted as an aid to its interpretation.

3. The upshot of the several opinions in *Bidlack* is that the *Senn* presumption against the continuation of retiree benefits beyond contract expiration continues to be the Seventh Circuit law, albeit in modified form.

The lead *Bidlack* opinion, written by Judge Posner and joined by two other judges, adopts the *Senn* presumption against vesting:

> No doubt a court should cast a cold eye on contentions that a contract with a fixed term actually

---

[1] The operative contract language in *Bidlack* is as follows: "those employees who have retired since September 22, 1959, will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain sixty-five (65) years of age," and will be entitled to supplemental health benefits "which, combined with Medicare, will provide a level of benefits equal to the Wheelabrator Blue Cross-Blue Shield plan for active and retired employees sixty-five (65) years of age or over" and which "shall be continued for the spouse after the death of the retiree." Slip Op. at 3-4.

> created a perpetual obligation . . ., and should, therefore, as *Senn* and many other cases hold . . ., presume that a collective bargaining agreement ceases to obligate the employer when the agreement's term . . . is up. [Slip Op. at 6 (citations omitted).]

Judge Posner's opinion goes on to address what is necessary to rebut this presumption. As we read his opinion, Judge Posner modifies *Senn* by "rejecting" the proposition that "the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires," *id.*, or be interpreted as providing health benefits only during its term. Rather, Judge Posner concludes, if the contract language is sufficiently equivocal on the intended duration of retiree health benefits, it would then be appropriate to consider extrinsic evidence and to apply the presumption against vesting "*after* extrinsic evidence has been considered." *Id.* at 11 (emphasis in original).[2]

Judge Cudahy, writing for two other judges, characterizes Judge Posner's opinion as adopting a "weak no-vest rule," Slip Op. at 15. In contrast, Judge Cudahy would opt for the rebuttable presumption in *favor* of vesting adopted by the Sixth Circuit in *International Union, United Auto, etc. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984):

> I would lean toward . . . application of the weak vest rule—the position adopted by the Sixth Circuit in the seminal case, *International Union, United Auto, etc. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). *See*

---

[2] Judge Posner's opinion does not provide any clear standard for determining when contract language will present an ambiguity sufficient to trigger consideration of extrinsic evidence. In this regard, Judge Posner suggests that the contract language in *Senn*—"the company 'will continue for retired employees' a specified premium contribution" (Slip Op. at 9)—may be too "weak[]" to create an ambiguity as to the intended duration of that benefit.

> *also Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (citing *Yard-Man* as "consistent with a more far-reaching understanding of the context in which retiree benefits arise."); *Local Union No. 150-A, United Food & Commercial Workers, etc. v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985) (inferring that benefits vested because "[t]here is simply no evidence that the Company and the Union did not intend to vest the right to benefits in the retirees."). [Slip Op. at 20.]

Judge Easterbrook, writing for himself and three other judges, states that the result of the various opinions in *Bidlack* is a reaffirmation of the *Senn* presumption:

> A majority of this court (the three judges subscribing to the lead opinion plus the four joining this one) reaffirms *Senn*—not only its holding that extrinsic evidence cannot create an ambiguity in otherwise clear documents, but also its holding that health and welfare benefits promised in collective bargaining agreements presumptively expire with those agreements. [Slip Op. at 26.]

4. After *Bidlack*, as before, the conflict between the circuits described in our petition continues to exist. We cannot improve on Judge Easterbrook's description of the current state of the law in the circuits with respect to the question presented here:

> Uncertainty now reigns. In at least one circuit health and welfare benefits mentioned in collective bargaining agreements presumptively vest on retirement. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). In this circuit such benefits presumptively do not vest, but the presumption is weak. Other circuits have still other formulae. E.g., *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988). And in most circuits employers retain complete freedom to alter retirees' health benefits in the absence of collective bargaining agreements . . . . Employers with national operations are subject to multiple and inconsistent rules, com-

> pounded by the uncertainty inherent in sending big-stakes questions to the constantly-changing panels that are juries. See Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees,* 5 DePaul Bus. L.J. 139, 145-60 (1992) (cataloging six distinct approaches). Uncertainty never promotes industry. Risk is an uncompensated, and substantial, cost of operations, and in this respect the fortunes of labor, capital, and consumers—that is, of us all—are linked. [Slip Op. at 34]

5. This case provides an appropriate vehicle for resolving the uncertainty described by Judge Easterbrook. To be sure, it is possible that if this Court were to effect a remand of this case to the Seventh Circuit, that court might conclude that *Bidlack*'s gloss on the *Senn* presumption leads to a result different from the result reached by the panel decision in this case. *See* note 1, *supra.*

But we submit that this possibility does not justify putting off to another day, or another case, this Court's resolution of the circuit conflict that is squarely presented here and that, as Judge Easterbrook notes, subjects national employers, and their unions, employees and retirees to "multiple and inconsistent rules" and to having the resulting "big stakes questions" decided by "the constantly-changing panels that are juries." The contract language here—the company "will continue for retired employees" the health insurance benefits in question—is simple and straight-forward. The question presented is the proper legal standard to be applied in interpreting such a provision. That is a pure question of law for this Court and it is ripe for decision. For all the reasons already stated, that legal standard needs to be determined by this Court in prompt fashion.

CONCLUSION

For the reasons set forth in the petition for certiorari, petitioners' reply brief, and petitioners' two supplemental briefs, the Court should grant the petition for certiorari.

Respectfully submitted,

WILLIAM T. PAYNE
SCHWARTZ, STEINSAPIR
DOHRMANN & SOMMERS
3580 Wilshire Boulevard
Suite 1820
Los Angeles, CA 90010

MIRIAM R. KATZMAN
ZUBRENSKY, PADDEN,
KATZMAN & WEIR
828 N. Broadway
Suite 410
Milwaukee, Wisconsin 53202

CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

ROBERT M. WEINBERG
(Counsel of Record)
JULIA PENNY CLARK
VIRGINIA A. SEITZ
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners